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IN THE
Supreme Court of the United States

October Term, 1972

No. 71-1637

CITY OF BURBANK, *et al.*,

Appellants,

vs.

LOCKHEED AIR TERMINAL, INC., *et al.*,

Appellees.

APPEAL FROM THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

**BRIEF OF THE PORT AUTHORITY OF NEW
YORK AND NEW JERSEY, AS AMICUS CURIAE.**

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INDEX

| | PAGE |
|---|------|
| Table of Authorities | i |
| Interest of <i>Amicus Curiae</i> | 1 |
| Summary of Argument | 5 |
| Argument: | 6 |
| Congress' intent, in the field of aircraft noise abatement, is to preempt for exclusive Federal Government control all State and local police power regulation but to permit airport operators to impose non-discriminatory restrictions on air- craft users | 6 |
| A. The Legislative History of the 1968 Aircraft Noise Abatement Amendment | 6 |
| B. The Contemporaneous Construction of the 1968 Aircraft Noise Abatement Amendment | 12 |
| C. The Legislative History of the Aircraft Noise Section of the 1972 Noise Control Act | 15 |
| Conclusion | 18 |
| Proof of Service | 19 |
| Exhibits: | 1a |
| A. Resolution of Board of Commissioners of Port Authority, December 14, 1972 | 1a |
| B. Jet Terms and Conditions for Use of Kennedy International Airport | 4a |
| C. Excerpt from S. Rep. No. 1353, 90th Cong., 2d Sess. (1968) | 6a |

Table of Authorities

CASES

American Airlines, et al., Port of New York Au-

| | |
|--|----------------------------|
| Supp. 226. (E.D.N.Y. 1967), aff'd, 398 F.2d 369 (2d Cir. 1968), cert. denied, 393 U.S. 1017 (1969) | 8, 9, 11 |
| Commissioner of Internal Rev. v. Shamburg's Estate, 144 F. 2d 998 (2d Cir. 1944), cert. denied, 323 U.S. 792 (1945) | 2 |
| In re Dreifus, F.A.A. Regulatory Docket, No. 9071 (July 10, 1969) | 13, 14 |
| Griggs v. Allegheny County, 369 U.S. 84 (1962) | 1, 4, 5, 6, 11, 12, 13, 18 |
| Helvering v. Gerhardt, 304 U.S. 405 (1938) | 2 |
| Port of New York Authority v. Eastern Airlines, 259 F. Supp. 745 (E.D.N.Y. 1966) | 3 |
| Port of New York Authority v. Hackensack Water Co., 41 N.J. 90 (1963) | 2 |
| Stagg v. Municipal Court, 2 Cal. App. 3d 318, 82 Cal. Rptr. 578 (1969) | 14 |
| Stoll, Matter of v. Port of New York Authority, 61 Misc. 2d 207, 305 N.Y.S. 2d 17 (Sup. Ct. 1969), aff'd, 32 A.D. 2d 892, 301 N.Y.S. 2d 943 (1st Dept. 1969), motion for leave to appeal denied, 25 N.Y. 2d 743, 306 N.Y.S. 2d 1025 (1969) | 12 |
| Trippe v. Port of New York Authority, 14 N.Y.2d 119 (1964) | 2 |

STATUTES

FEDERAL:

| | |
|--|------------------------------------|
| Federal Aviation Act of 1958, Sec. 611 (added), 82 Stat. 395 (1968), 49 U.S.C. § 1431 | 5, 6, 7, 10, 12, 13, 15, 16, 17 |
| Noise Control Act of 1972, 86 Stat. 1234 (1972) .. | 7, 15, 17 |

| | |
|---|---|
| Port Compact of 1921, Congressional Consent, 42 Stat. 174 (1921) | 2 |
|---|---|

STATE:

| | |
|--|---|
| Laws of N.J., 1921, Ch. 151—Compact Authoriza- tion Act | 2 |
| Laws of N.Y. 1921, Ch. 154—Compact Authoriza- tion Act | 2 |

MISCELLANEOUS

| | |
|---|---------------------|
| 118 Cong. Rec. H. 1539 (daily ed. Feb. 29, 1972) ... | 15 |
| 118 Cong. Rec. S. 17989 (daily ed. Oct. 13, 1972) ... | 17 |
| 118 Cong. Rec. S. 18007 (daily ed. Oct. 13, 1972) ... | 15 |
| H.R. Rep. No. 92-842, 92d Cong., 2d Sess. (1972) ... | 16 |
| S. Rep. No. 92-1160, 92d Cong., 2d Sess. (1972) | 16, 17 |
| S. Rep. No. 1353, 90th Cong., 2d Sess. (1968) | 7, 8, 9, 10, 11, 15 |
| Senate Hearing Before Aviation Subcommittee of The Committee on Commerce, 90th Cong., 2d Sess., pp. 28-29 (1968) | 11, 12 |
| 34 Fed. Reg. 18355-56 (Nov. 18, 1969) | 12, 13 |
| 35 Fed. Reg. 12555-56 (Aug. 6, 1970) | 14, 15 |
| 14 C.F.R., Part 93, Subpart K (Feb. 26, 1969) | 14 |
| Executive Office of the President, Office of Science and Technology, A Report of the Jet Aircraft Noise Panel—Alleviation of Jet Aircraft Noise Near Airports (1966) | 10 |
| Reaction of People to Exterior Aircraft Noise, <i>Noise Control</i> , September, 1959, at 287 | 4 |

| | |
|---|----------|
| The Port of New York Authority, Resolution of Committee on Operations of Port Authority Commissioners, July 12, 1951, pp. 22, 26 | 3 |
| The Port Authority of New York and New Jersey, Resolution of Board of Commissioners, December 14, 1972, Exhibit A | 2 |
| Jet Terms and Conditions for Use of Kennedy International Airport, Exhibit B | 4 |

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**BRIEF OF THE PORT AUTHORITY OF NEW
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Interest of Amicus Curiae

The Port Authority of New York and New Jersey which was not a party of an *amicus curiae* in the last aircraft noise case decided by this Court, *Griggs v. Allegheny County*, 369 U.S. 84 (1962), herewith submits a brief, *amicus curiae*, pursuant to Rule 42(4) of the Revised Rules of this Court. This rule provides that consent to file such a brief need not be had when, like the instant brief,

it is presented on behalf of a political subdivision of a State sponsored by its authorized law officer.¹

The specific issue on this appeal—the validity of a local police power ordinance prohibiting the takeoff of jet aircraft during nighttime hours from an airport serving air carrier aircraft—is of vital interest to your *amicus* which operates the three commercial airports in the New York-New Jersey metropolitan area, John F. Kennedy International and LaGuardia Airports in New York and Newark International Airport in New Jersey.

The Port Authority has, in its capacity as airport operator, established its own restrictions on the use of jet aircraft at its airports—restrictions which it believes are essential to the continued viability of its air terminal system. These restrictions were the subject of testimony in this case. Appellants' Appendix, Volume I, pp. 300-308. The Port Authority is vitally concerned that any decision which this Court might reach in the instant case does not jeopardize, in any way, the validity of the Authority's own limitations on jet aircraft flights. The airlines which use

¹ The present brief clearly falls within Rule 42(4) of the Revised Rules of this Court. The Port Authority of New York and New Jersey (formerly The Port of New York Authority) is a governmental agency of the States of New York and New Jersey, having been created by the Port Compact of 1921 between them, consented to by Congress. Ch. 154, Laws of N.Y., 1921; Ch. 151, Laws of N.J., 1921; 42 Stat. 174 (1921). That the Authority is a political subdivision of two States does not make it any less a political subdivision of one State. *Commissioner of Internal Rev. v. Shamburg's Estate*, 144 F. 2d 998 (2d Cir. 1944), cert. denied, 323 U.S. 792 (1945). See also *Helvering v. Gerhardt*, 304 U.S. 405 (1938); *Trippe v. Port of New York Authority*, 14 N.Y. 2d 119 (1964); *Port of New York Authority v. Hackensack Water Co.*, 41 N.J. 90 (1963).

As General Counsel of the Port Authority, I have been authorized to file this brief on the Authority's behalf by resolution of its Board of Commissioners, dated December 14, 1972, a copy of which is attached hereto as Exhibit A.

its three commercial airports have never acknowledged the Authority's power, as airport operator, to impose these restrictions on their jet aircraft and in a 1966 Federal court action one airline unsuccessfully contested the Port Authority's right to enforce a temporary ban on the use of jet aircraft on a runway at LaGuardia Airport.² That the validity of the Authority's own jet noise restrictions might be jeopardized by a decision here can be seen from the following statement contained in the brief submitted to this Court by the instant appellees in support of their motion to affirm the Ninth Circuit's decision: "... the scope of the power of an airport proprietor to impose noise restrictions is an unresolved issue involving difficult constitutional, statutory and contractual issues." p. 17, footnote.

While the Port Authority's restrictions on the use of jet aircraft at its airports go all the way back to 1951,³

² *Port of New York Authority v. Eastern Airlines*, 259 F. Supp. 745 (E.D.N.Y. 1966).

³ In 1951, seven years before the advent of commercial jet operations, the Port Authority, already concerned that the noise from jet-powered aircraft would prove far more annoying to airport neighbors than that produced by piston aircraft, adopted a regulation providing that no jet aircraft may use its airports without permission. *Resolution of Committee on Operations of Port Authority Commissioners*, July 12, 1951, pp. 22, 26. As the record in this case shows, it was the adoption of this regulation which led to the installation of noise suppressors on the first generation of jet aircraft used in commercial operation. Appellants' Appendix, Volume I, pp. 306-7. However, at that time no standard existed which measured a listener's reactions to aircraft noise. The Port Authority retained the acoustical firm of Bolt, Beranek and Newman of Cambridge, Massachusetts, to devise such a standard.

The standard ultimately devised was termed "perceived noise levels in units of PNdB decibels" which, as described by Leo L. Beranek, Karl D. Kryter and Laymon N. Miller, "expresses in a compact way the measure of 'noisiness' that is implicit in a listener's reactions to the sounds of aircraft and yet it is measured on a scale that is roughly comparable to the more familiar scales of physically-



the crucial importance of these restrictions to the Authority's financial viability was underscored by this Court's 1962 holding in *Griggs v. Allegheny County*, 369 U.S. 84. That case held, over the dissent of Justices Black and Frankfurter, that if, as the result of low altitude flights of commercial aircraft operating from a publicly-owned airport, an avigation easement is taken over nearby property, it is the airport operator, and not the United States or the airlines, who is the financially responsible party. We respectfully submit that this decision has had a most unfortunate impact on the aircraft noise problem since it placed

measured noise levels." The same authors go on to state "The perceived noise level takes into account the distribution of power as a function of frequency, i.e., the frequency spectrum of a sound. In particular, the perceived noise level of a sound reflects the fact that people judge higher frequencies to be more annoying or less acceptable than lower frequencies when factors such as 'meaning,' novelty, adaption, etc., are held constant." "Reaction of People to Exterior Aircraft Noise," *Noise Control*, September, 1959, at p. 287.

Therefore, in 1958 when the commercial airlines first sought permission from the Port Authority to introduce jet aircraft in scheduled operations, the Port Authority was able to establish a noise rule based on PNdBs. That rule (which has been in effect ever since although expressed in various ways) is based on the principle that permission to use jet aircraft is granted only on the condition that the noise produced by each jet flight in the communities under the take-off flight path, is no greater than that produced by 75% of the large 4-engine piston aircraft in use at the time jet aircraft were being introduced. That value, 112 PNdB, was set by the Port Authority as the limit for jet take-off noise. The method of meeting the 112 PNdB requirement is the responsibility of the aircraft operator. This may involve, in some cases, steeper climb angles, turns away from communities, reduced thrust over communities or reduced take-off weight. In addition, at John F. Kennedy International Airport, over-water takeoffs are required during nighttime hours. In every case, however, the Port Authority requires the aircraft to obey all applicable Federal regulations and if, for any reason, an aircraft is unable to comply with both sets of regulations in connection with a particular flight, permission for the flight does not exist. A copy of the Port Authority's current jet terms and conditions for John F. Kennedy International Airport is attached hereto as Exhibit B.

the financial burden of such noise on the one segment of the aviation community that is least able to obviate the financial consequences of aircraft noise exposure. At the same time, it removed from those segments of the industry who had the power to take meaningful action to alleviate aircraft noise all direct financial incentive to do so. Nevertheless, until the Court chooses to overrule *Griggs*, an airport operator has to live with its holding. And, in our opinion, an inevitable corollary of *Griggs* must be that such an operator possesses the right to protect itself from possible massive monetary liability to airport neighbors by limiting or otherwise conditioning the use that certain types of aircraft can make of its facilities. Otherwise, an impossible situation would be created for an airport operator since, in certain instances, only by restricting the use of jet aircraft can it avoid monetary liability to property owners aggrieved by aircraft noise.

Moreover, only by such regulatory power can the local airport operators set the stage for providing additional airport capacity, the development of which has, as a practical political matter, been virtually halted due to local concern over intolerable noise levels.

Summary of Argument

This brief will make one point in two interrelated parts. It will demonstrate that the legislative history of the noise abatement amendments to the Federal Aviation Act of 1972 shows a clear Congressional intent to preempt for exclusive Federal control the right of State and local governments to exercise their police powers in this area. In this same legislative history will show with equal clarity that Congress did not intend to preclude State and local governments, acting in their capacity as proprietors of our Nation's air terminal system, from taking action to limit aircraft noise.

We cannot and will not take issue with Burbank's assertion that the Federal Government has failed to take sufficient steps to alleviate severe aircraft noise pollution. Nor can we take issue with Burbank's conclusion that this failure is due in large measure to the refusal of Congress to authorize the Federal Aviation Administration (FAA) to take any action which might cause this Court to limit or overrule its decision in *Griggs*. The legislative history of the noise amendments to the Federal Aviation Act demonstrates that the Port Authority fully agrees with Burbank's position on these two matters.

ARGUMENT

Congress' intent, in the field of aircraft noise abatement, is to preempt for exclusive Federal Government control all State and local police power regulation but to permit airport operators to impose non-discriminatory restrictions on aircraft users.

A. The Legislative History of the 1968 Aircraft Noise Abatement Amendment

Until 1968, as the noise problem grew in intensity throughout the nation, the FAA steadfastly maintained that while it could cooperate with airport operators, airlines, airline pilots and communities in establishing preferential runways in the interest of noise relief, its power to do so was strictly incidental to its major function—flight safety regulation. And on the vital question of aircraft certification, the FAA's position, in effect, was that any air carrier aircraft which met its safety standards was entitled to certification, irrespective of the aircraft's noise characteristics.

The change finally came only four years ago when, at the urging of airport operators, the Executive Branch of the Federal Government and others, Congress enacted an air-

craft noise abatement statute in the form of an amendment to the Federal Aviation Act of 1958. Although neither this amendment, nor the subsequently passed Noise Control Act of this year contains any express provision preempting the field of aircraft noise regulation, the legislative history specifically defined the nature and scope of that preemption. It makes clear, beyond any reasonable doubt, that the City of Burbank's prohibition on nighttime jet takeoffs at the independently-owned Hollywood-Burbank Airport falls squarely within the preempted area.

This Congressional intent is expressed in the legislative history of the 1968 amendment (§ 611 of the Federal Aviation Act) in which the FAA was given, for the first time, express responsibilities and authority in the area of aircraft noise.

The 1968 amendment provides:

"In order to afford present and future relief and protection to the public from unnecessary aircraft noise and sonic boom, the Administrator of the Federal Aviation Administration, after consultation with the Secretary of Transportation, shall prescribe and amend standards for the measurement of aircraft noise and sonic boom and shall prescribe and amend such rules and regulations as he may find necessary to provide for the control and abatement of aircraft noise and sonic boom. . . ." § 611, Federal Aviation Act; 49 U.S.C. § 1431(a)

The Report of the Senate Commerce Committee on H.R. 3400⁴ which became the 1968 amendment (§ 611 of the Federal Aviation Act) states in unequivocal language that:

"H.R. 3400 would merely expand the Federal Government's role in a field already preempted. It would not change this preemption. State and local governments will remain unable to use their police

⁴The pertinent portion of the Senate Report is attached hereto as Exhibit C.

powers to control aircraft noise by regulating the flight of aircraft." S. Rep. No. 1353, 90th Cong., 2d Sess. at p. 6 (1968). See Exhibit C.

The Committee's conclusion follows a discussion of Judge Dooling's holding in *American Airlines, et al, Port of New York Authority, et al. v. Town of Hempstead*, 272 F. Supp. 226 (E.D.N.Y. 1967), aff'd, 398 F.2d 369 (2d Cir. 1968), cert. denied, 393 U.S. 1017 (1969), which the Committee used to define the nature and scope of Federal preemption in this field. The Senate Report points out that:

"The courts have held that the Federal Government presently preempts the field of noise regulation insofar as it involves controlling the flight of aircraft. Local noise control legislation limiting the permissible noise level of all overflying aircraft has recently been struck down because it conflicted with Federal regulation of air traffic. *American Airlines v. Town of Hempstead*, 272 F. Supp. 226 (U.S.D.C., E.D., N.Y., 1966). The court said, at 231, 'The legislation operates in an area committed to Federal care, and noise limiting rules operating as do those of the ordinance must come from a Federal source . . . ' " S. Rep., p. 6, see Exhibit C.

The *Hempstead* case involved an attempt by a town adjoining Kennedy International Airport to use its police power to protect its citizens from noise disturbance by prohibiting the operation of any mechanism or device, including aircraft, which created a noise within the town in excess of certain specified daytime and nighttime limits. Enforcement of the ordinance would have prevented the use of five runways at Kennedy Airport. Judge Dooling determined that the ordinance was an *indirect* attempt to exclude aircraft from the lower reaches of the navigable airspace. He pointed out that

"to exclude the aircraft noise from the Town is to exclude the aircraft; to set a ground level decibel limit for the aircraft is directly to exclude it from

the lower air that it cannot use without exceeding the decibel limit." 272 F. Supp. 226, 230.

He further found that:

"the ordinance does not forbid noise except by forbidding flights . . ." Id.

As the Senate Report states, Judge Dooling concluded that the Hempstead ordinance "operates in an area committed to Federal care, and noise limiting rules operating as do those of the ordinance must come from a Federal source." Senate Report, p. 6. He therefore held that the ordinance invaded a field preempted by the Federal Government.⁶

The Burbank ordinance, like the Hempstead ordinance, is an attempt—direct rather than indirect—to use local police power to exclude aircraft from the navigable airspace and thus to regulate the flight of aircraft. The Senate Report specifically states that Congress has preempted State and local police power so to do.

But Congress did not intend entirely to prevent State and local governments from acting in this area. The Senate Report specifically states that:

"the proposed legislation will not affect the rights of a State or local public agency, as the proprietor of an airport, from issuing regulations or establishing requirements as to the permissible level of noise which can be created by aircraft using the airport. Airport owners acting as proprietors can presently deny the use of their airports to aircraft on the basis of noise considerations so long as such exclusion is nondiscriminatory." Senate Report, p. 6.

⁶ Judge Dooling also held that the ordinance conflicted with valid applicable Federal regulations and was an unconstitutional burden on commerce. 272 F. Supp. 226, 235-236. On appeal, the Second Circuit upheld Judge Dooling's decision on the ground of conflict without reaching the questions of preemption and burden. 398 F. 2d 39, 376. fn. 4.

The right of an airport proprietor to act in this field was first claimed by the Port Authority to support its jet noise restrictions. As my predecessor stated in 1966 before a White House panel on the noise problem:

"... Port Authority restrictions are not based on police power considerations but rather upon the inherent right of a landowner to control, either by contract or otherwise, the activities of those who use his facilities—activities for which . . . the airport operator might be held liable to property owners in adjacent communities. It seems clear that the Port Authority possesses the power to require its airline tenants to refrain from using its facilities in such a way as to subject it to money damage claims brought by airport neighbors or otherwise to engage in activities that will prove detrimental to its good name or to that of its airports."⁶

The Senate Report gives the following rationale for continued participation by airport operators:

"Just as an airport owner is responsible for deciding how long the runways will be, so is the owner responsible for obtaining noise easements necessary to permit the landing and takeoff of the aircraft. The Federal Government is in no position to require an airport to accept service by larger aircraft and, for that purpose, to obtain longer runways. Likewise, the Federal Government is in no position to require an airport to accept service by noisier aircraft, and for that purpose to obtain additional noise easements. The issue is the service desired by the airport owner and the steps it is willing to take to obtain the service. In dealing with this issue, the Federal Government should not substitute its judgment for that of the States or elements of local government who, for the most part, own and operate

⁶ EXECUTIVE OFFICE OF THE PRESIDENT, OFFICE OF SCIENCE AND TECHNOLOGY, A Report of the Jet Aircraft Noise Panel—Alleviation of Jet Aircraft Noise Near Airports, p. 136 (1966). This Report is part of the legislative history of the 1968 Noise Abatement Amendment. See S. Rep. No. 1353, pp. 2, 10.

our Nation's airports. The proposed legislation is not designed to do this and will not prevent airport proprietors from excluding any aircraft on the basis of noise considerations." Senate Report, p. 7.

In other words, the Senate Committee not only agreed with the Port Authority's contention that there is a legal distinction between local ordinances and a landlord's restrictions but it was happy to do so for two reasons. First, the record shows that the Senate Committee was worried lest the expansion of the Federal Government's regulatory powers to include noise certification would affect its legal and financial liability, possibly leading to an overturning of *Griggs*.¹

Second, the Committee acknowledged that an airport proprietor could control aircraft noise by making a determination not to expand or improve an existing airport for the purpose of accommodating noisier jets. It knew that in reaching such a decision the airport proprietor must balance noise costs against the need for air commerce. It further recognized that noise costs (additional land acquisition or avigation easements) could be minimized by airport restrictions designed to make the noisy jet more compatible with the neighboring community. Lastly, it faced up to the fact that the attempts by airport operators to establish new jetports were increasingly blocked by citizen

¹At the Senate Hearing on H.R. 3400, Senator Monroney asked two related questions. The first was:

"... Will enactment of this legislation causing direct Federal involvement in the field of aircraft noise abatement and control increase the legal liability of the Federal Government for damage and damage claims caused by aircraft noise or sonic boom?"

And the second was:

"Would this legislation to any degree preempt State and local government regulation of aircraft noise and sonic boom?"

Hearing on S. 707 and H.R. 3400, Before Aviation Subcommittee of The Committee on Commerce, United States Senate, 90th Congress, 2nd Session, pp. 28-29 (1968).

concern over aircraft noise.⁸ The Senate Committee therefore concluded that the growth of air commerce would be best served by giving specific sanction to the airport operator's right to restrict the use of its air terminals for noise abatement purposes.

If, however, this Court should determine that an airport operator has no such right, then we submit that *Griggs v. Allegheny County* must be overruled since such a right is the only way the airport operator can guard against the monetary liability imposed on it by that decision. We do not mean to imply that this would be the only situation that would call for an overruling of *Griggs*. That case dealt solely with piston aircraft and the record there failed to reflect the magnitude of Federal Government and airline involvement in, and responsibility for, the aircraft noise problem in the age of jet airliners. Appellants correctly point out that overruling *Griggs* would "stimulate the Federal Aviation Administration and the airlines into taking more appropriate action in the areas of jet aircraft noise abatement". Appellants' brief, pp. 77-78.

B. The Contemporaneous Construction of the 1968 Aircraft Noise Abatement Amendment

The preamble to the first regulation issued by the FAA under the 1968 amendment contains a thorough discussion

⁸ *Senate Hearing*, p. 43. See also *American Airlines, et al., Port of New York Authority, et al. v. Town of Hempstead*, 272 F. Supp. 226, 228 (E.D.N.Y. 1966) and Appendix "A" to this Brief, concerning the Port Authority's unsuccessful attempts to locate a new jetport. Cf. *Matter of Stoll v. Port of New York Authority*, 61 Misc. 2d 207, 208, 305 N.Y.S. 2d 17, 19 (Sup. Ct. 1969) *aff'd*, 32 A.D. 2d 892, 301 N.Y.S. 2d 943 (1st Dept. 1969), motion for leave to appeal denied, 25 N.Y. 2d 743, 306 N.Y.S. 2d 1025 (1969) where noise was undoubtedly the cause of some of the "political and social considerations" referred to by the court in explanation of why there thus far has not been a fourth jetport in the New York-northern New Jersey metropolitan area.

of the scope of Federal preemption in the field of noise abatement. 14 C.F.R., Part 36. This contemporaneous construction of the 1968 amendment explained that:

"Responsibility for determining the permissible noise levels for aircraft using an airport remains with the proprietor of that airport. The noise limits specified in Part 36 . . . are not intended to substitute federally determined noise levels for those more restrictive limits determined to be necessary by individual airport proprietors in response to the locally determined desire for quiet and the locally determined need for the benefits of air commerce. This limitation on the scope of Part 36 is required for consistency with the responsibilities placed upon the airport proprietor by the U.S. Supreme Court in *Griggs v. Allegheny County*, 369 U.S. 84 (1962). Consistent with this limited scope, this amendment specifies that the Federal Aviation Administration make no determination, under Part 36, on the acceptability of the prescribed noise levels in any specific airport environment (see §§ 36.5 and 36.1581(a)).

. . .

. . . the FAA, in response to the *Griggs* decision (see above), recognizes the right of State or local public agencies, as the proprietors of airports, to issue nondiscriminatory restrictions with respect to the permissible level of noise that can be created by aircraft using their airports." 34 Federal Register 18355-18356, November 18, 1969.

However, the preamble cautioned that the FAA:

" . . . does not recognize any right of any State or local government agency that is not an airport proprietor to issue any regulation controlling the flight of aircraft for noise purposes." *Id.* at 18356.

Indeed, four months earlier the Acting FAA Administrator had given the very same construction to the 1968 amendment in denying a petition for rule making. *In re Dreifus*, FAA Regulatory Docket, No. 9071, July 10,

1969, Appellants' brief, App. 4-13. The petition asked the FAA to adopt a rule prescribing time limitations for turbojet aircraft operating at Santa Monica, California, Municipal Airport similar to those imposed by that City's nighttime curfew ordinance which had been declared invalid by a state court decision.⁹ The Administrator first pointed out that:

"The FAA agrees that nondiscriminatory time restrictions may be an effective and appropriate means of adapting aircraft noise to the needs of local communities." Appellants' brief, App. 7.

He then addressed himself to the question of which "level of government has the power to so regulate or restrict aircraft operations?" Appellants' brief, App. 7. Based upon a complete review of the legislative history of the 1968 amendment, the Administrator concluded:

"While States may not use their police power to regulate in any way flight of aircraft for noise purposes, State and local governmental proprietors of airports may deny the use of their airports to aircraft on the basis of noise considerations so long as such exclusion is nondiscriminatory." Appellants' brief, App. 10.¹⁰

A year later the FAA again recognized the authority of an airport proprietor to regulate in the aircraft noise field when it issued its Advance Notice of Proposed Rulemaking (ANPRM) on Civil Supersonic Aircraft Noise Type Certification Standards which would involve amending 14 C.F.R.,

⁹ That decision was reversed on appeal and the right of the City of Santa Monica, proprietor of the airport, to impose a curfew was upheld. *Stagg v. The Municipal Court*, 2 Cal. App. 3d, 318, 82 Cal. R.P.T.R. 578 (1969).

¹⁰ It is interesting to note that the Administrator had issued the High Density Traffic Airports Rule earlier that year. 14 C.F.R., Part 93, Subpart K, Feb. 26, 1969. Obviously, he saw no possible conflict between that rule and an airport proprietor's noise restrictions.

Part 36. 35 Fed. Reg. pp. 12555-56, August 6, 1970. The ANPRM specifically requested comments directed to the following question:

"The development of methods to be applied to ensure that maximum use of the regulatory authority under § 611 is made, with respect to civil supersonic aircraft, without Federal interference with the right of States or local public agencies, as the proprietors of airports, to issue regulations or establish requirements as to the permissible level of noise which can be created by aircraft using their airports (see Senate Report 1353, pp. 6, 7)." *Id.*

C. The Legislative History of the Aircraft Noise Section of the 1972 Noise Control Act

Contrary to the contention made by the Attorney General of California, appearing herein *amicus curiae*, Supp. Brief, pp. 14-16, the legislative history of the Noise Control Act of 1972 only serves to reaffirm the fact that Congress intended to preempt State and local police power in the field of aircraft noise emissions but to permit regulation by airport proprietors.¹¹ Section 7 of the 1972 Act, dealing with aircraft noise emissions, like the 1968 amendment (§ 611), contains no express preemption provision. The brief of the Attorney General of California erroneously argues that the absence of such an express provision in Section 7 and the inclusion of such a provision in a similar bill which originally passed the Senate indicates that Con-

¹¹ Section 7(b) of this Act amends the 1968 statute (§ 611) to require, *inter alia*, the Administrator of the Environmental Protection Agency to submit to the FAA proposed regulations which the Administrator determines are necessary to protect the public health and welfare. Noise Control Act of 1972, Public Law 92-574, 92d Cong., 86 Stat. 1234. The Act combines provisions from House and Senate bills on this subject passed earlier this year. The original version of H.R. 11021 was passed by the House on February 29, 1972 but was never concurred in by the Senate. 118 Cong. Rec. H. 1539 (daily ed. Feb. 29, 1972). A Senate version, S. 3342, was passed by the Senate on October 13, 1972, but was never concurred in by the House. 118 Cong. Rec. S. 18007 (daily ed. Oct. 13, 1972).

gress consciously determined not to preempt this field, pp. 14-16. The fact, however, is that both the Senate and House Committees which considered the respective noise control bills included in their Reports unequivocal statements assuring all parties concerned that the bills would make no change in the existing preemption rule.

Thus, the House Report to accompany H.R. 11021, written with full knowledge of the legislative history and contemporaneous construction of the 1968 amendment (§ 611), states that:

"No provision of the bill is intended to alter in any way the relationship between the authority of the Federal Government and that of the State and local governments that existed with respect to matters covered by section 611 of the Federal Aviation Act of 1958 prior to the enactment of the bill." House Report No. 92-842, 92nd Cong. 2d Sess., p. 10 (1972).

Senate Bill 3342, as reported out by the Senate Committee on Public Works, contained the following preemption section:

"Sec. 506. No State or political subdivision thereof may adopt or attempt to enforce any standard respecting noise emissions from any aircraft or engine thereof unless such standard is identical to a standard applicable to such aircraft under this part."

The Report of the Senate Committee on Public Works on S.3342, as above amended, states in clear and unequivocal terms that:

"States and local governments are preempted from establishing or enforcing noise emission standards for aircraft unless such standards are identical to standards prescribed under this bill. This does not address responsibilities or powers of airport operators, and no provision of the bill is intended to alter in any way the relationship between the authority of the Federal government and that of

State and local governments that existed with respect to matters covered by section 611 of the Federal Aviation Act of 1958 prior to the enactment of the bill. Senate Report No. 92-1160, 92 Cong. 2d Sess., pp. 10-11 (1972).

Senate S.3342 was subsequently changed by an amendment offered by Senator Tunney and therefore the final version, as passed by the Senate, but not the House, contained a new § 506 (renumbered § 505). The new § 505 which the Senate passed provided:

"Sec. 505. No State or political subdivision thereof may adopt or enforce any standard respecting noise emissions from any aircraft or engine thereof."

At the time he sponsored the amendment, Senator Tunney explained:

"There was no intention in the committee bill to alter the relative power of the Federal Government, State and local government, and airport operator, over the control of aircraft noise. This amendment would also retain the same powers for all parties." 118 Cong. Rec. S. 17989 (daily ed. Oct. 13, 1972).

As previously noted, although the Noise Control Act of 1972, which was finally passed, contains no express aircraft noise preemption provision, Congress' obvious intent concerning preemption is crystal clear, to wit, there should be no change in the relative powers among (a) the Federal Government, (b) State and local governments, and (c) airport operators regarding the regulation of aircraft noise from that which existed prior to its adoption. Categorical declarations to this effect are contained in both the relevant Senate and House Committee Reports which we have just quoted. No contrary statement is to be found in the entire legislative history of the act.

CONCLUSION

In light of the foregoing, we respectfully submit that the decision below should be affirmed since Congress intended, in the field of aircraft noise abatement, to preempt for exclusive Federal Government control all local police power regulations such as that enacted by the City of Burbank which is the subject of this appeal. At the same time, Congress desired, as we have shown, that airport operators possess the right to impose nondiscriminatory restrictions on the aircraft users of their facilities in the interest of noise abatement. And, if for any reason, this Court concludes that such right does not exist, then we believe that *Griggs v. Allegheny Co.* must be overruled.

Respectfully submitted,

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December 22, 1972

Proof of Service

I, PATRICK J. FALVEY, a member of the Bar of the Supreme Court of the United States, and General Counsel of The Port Authority of New York and New Jersey, appearing herein, *Amicus Curiae*, hereby certify that on the 22nd day of December, 1972, I served copies of the foregoing brief on counsel for Appellants, counsel for Appellees, and counsel for the State of California, *Amicus Curiae*, by mailing three copies thereof in a duly addressed envelope, with air mail postage prepaid, to each of the following in this cause:

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EXHIBIT "A"

Resolution adopted by Board of Commissioners of The Port Authority of New York and New Jersey at its meeting of December 14, 1972 (appearing at pp. 495-496 of the Official Minutes of that date).

Lockheed Air Terminal Inc. v. City of Burbank, Inc.-Filing of Brief Amicus Curiae

It was reported that the United States Supreme Court on October 10, 1972, noted probable jurisdiction in *Lockheed Air Terminal v. City of Burbank, Inc.*, a case involving the constitutionality of an ordinance of the City of Burbank, California, prohibiting the departure of jet aircraft from the Hollywood-Burbank Airport between 11:00 p.m. and 7:00 a.m. Hollywood-Burbank Airport is owned and operated by Lockheed Air Terminal, Inc., a private corporation but is utilized by regularly scheduled airlines. The Air Transport Association of America joined Lockheed in challenging the constitutionality of the ordinance.

The case comes before the nation's highest court on appeal from a judgment of the United States Court of Appeals for the Ninth Circuit. That Court ruled that the Burbank ordinance is invalid under the supremacy clause of the United States Constitution because it (1) invades a field preempted by Congress for exclusive regulation by the Federal Government, and (2) conflicts with a previously enacted Federal Aviation Administration runway preference rule for nighttime use of the airport.

The ultimate resolution of the issues in the Burbank case is important to the Port Authority for two reasons. First, there has been increasing pressure in the communities surrounding Port Authority airports for the establishment of nighttime curfews. This community pressure in large part was responsible for the pending suit brought by the At-

"A" Exhibit "A"

torney General of New York against the Port Authority and the air carriers using the New York airports, which, in addition to other relief, seeks to curtail flights during evening hours at these airports. The Port Authority has long been convinced that such night curfews would adversely affect commerce and industry in the Port of New York.

Second, although the Port Authority supports the holding of the Court of Appeals for the Ninth Circuit, it is General Counsel's opinion that the sweeping language used by that Court to invalidate the ordinance will subsequently be employed by the airlines to strike down noise restrictions imposed by airport operators. The airlines have never conceded the validity of Port Authority restrictions which in one form or another have been in effect since 1951 and have advised the United States Supreme Court in this proceeding that the power of an airport proprietor in this field remains an unsolved issue involving "difficult constitutional, statutory and contractual issues." It is essential that the Port Authority's right to bar or restrict aircraft from its airports remain unimpaired in order that it can protect airport neighbors from undue noise and at the same time limit the Port Authority's legal responsibility and financial liability. This is particularly pertinent in view of the coming entrance into service of supersonic aircraft, the noise emissions of which are not limited in any way by Federal law or regulation. In addition, it is conceivable that the Port Authority may find it necessary to impose stricter noise restrictions, including some type of nighttime restrictions, to keep its air terminal system viable. The Port Authority's failure to develop a fourth jetport was due in large measure to citizen concern with aircraft noise and the resultant lack of airport capacity was a partial reason for the imposition of hourly quotas on aircraft movements at Port Authority airports.

Exhibit "A"

It is recommended, therefore, that the Board authorize the filing of a brief *amicus curiae* with the Supreme Court in support of Lockheed's position that Section 20-32.1 of the Burbank, California ordinance prohibiting pure jets from taking off from Hollywood-Burbank Airport between 11:00 p.m. and 7:00 a.m. is invalid under the supremacy clause because the City is purporting to exercise its police power in an area which has been preempted by the Federal Government and in so doing, protect the integrity of the Port Authority's current noise restrictions for jet aircraft as well as its right to impose additional limits, should this be necessary, to keep the Port Authority air terminal system viable.

Whereupon, the following resolution was unanimously adopted:

RESOLVED, that General Counsel be and he hereby is authorized, on behalf of the Port Authority, to file a brief *amicus curiae* with the United States Supreme Court in the case of Lockheed Air Terminal, Inc. v. City of Burbank, Inc. in support of the airport and airlines position that Section 20-32.1 of the Burbank ordinance prohibiting pure jets from taking off from Hollywood-Burbank Airport between 11:00 p.m. and 7:00 a.m. is invalid under the supremacy clause because the City is purporting to exercise its police power in an area which has been preempted by the Federal Government and in so doing, protect the integrity of the Port Authority's current noise restrictions for jet aircraft as well as its right to impose additional limits, should this be necessary, to keep the Port Authority air terminal system viable.



FOLDOUT(S) IS/ARE TOO LARGE TO BE FILMED.

EXHIBIT "C"

**Excerpt from Senate Report No. 1353,
90th Congress, Second Session (1968)**

Relation to Local Government Initiatives

The bill is an amendment to a statute describing the powers and duties of the Federal Government with respect to air commerce. As indicated earlier in this report, certain actions by State and local public agencies, such as zoning to assure compatible land use, are a necessary part of the total attack on aircraft noise. In this connection, the question is raised whether this bill adds or subtracts anything from the powers of State or local governments. It is not the intent of the committee in recommending this legislation to effect any change in the existing apportionment of powers between the Federal and State and local governments.

In this regard, we concur in the following views set forth by the Secretary in his letter to the committee of June 22, 1968:

The courts have held that the Federal Government presently preempts the field of noise regulation insofar as it involves controlling the flight of aircraft. Local noise control legislation limiting the permissible noise level of all overflying aircraft has recently been struck down because it conflicted with Federal regulation of air traffic. *American Airlines v. Town of Hempstead*, 272 F. Supp. 226 (U.S.D.C. E.D., N.Y., 1966). The court said, at 231, "The legislation operates in an area committed to Federal care, and noise limiting rules operating as do those of the ordinance must come from a Federal source." H.R. 3400 would merely expand the Federal Government's role in a field already preempted. It would not change this preemption. State and local governments will remain unable to use their police powers to control aircraft noise by regulating the flight of aircraft.

Exhibit "C"

However, the proposed legislation will not affect the rights of a State or local public agency, as the proprietor of an airport, from issuing regulations or establishing requirements as to the permissible level of noise which can be created by aircraft using the airport. Airport owners acting as proprietors can presently deny the use of their airports to aircraft on the basis of noise considerations so long as such exclusion is nondiscriminatory.

Just as an airport owner is responsible for deciding how long the runways will be, so is the owner responsible for obtaining noise easements necessary to permit the landing and takeoff of the aircraft. The Federal Government is in no position to require an airport to accept service by larger aircraft and, for that purpose, to obtain longer runways. Likewise, the Federal Government is in no position to require an airport to accept service by noisier aircraft, and for that purpose to obtain additional noise easements. The issue is the service desired by the airport owner and the steps it is willing to take to obtain the service. In dealing with this issue, the Federal Government should not substitute its judgment for that of the States or elements of local government who, for the most part, own and operate our Nation's airports. The proposed legislation is not designed to do this and will not prevent airport proprietors from excluding any aircraft on the basis of noise considerations.

Of course, the authority of units of local government to control the effects of aircraft noise through the exercise of land use planning and zoning powers is not diminished by the bill.

Finally, since the flight of aircraft has been preempted by the Federal Government, State and local governments can presently exercise no control over sonic boom. The bill makes no change in this regard.